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IN THE

Supreme Court of the United States

October Term, 1971

No. _____

OHIO AFL-CIO, THE UNITED AUTOWORKERS OF OHIO AND IRA THOMPSON,
Petitioners,

vs.

THE INSURANCE RATING BOARD, UNITED STATES FIDELITY AND GUARANTY COMPANY, and EUGENE BROWN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Ohio AFL-CIO, The United Autoworkers of Ohio, and Ira Thompson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 30, 1971.

OPINION BELOW

The opinion of the Court of Appeals is reported at 451 F.2d 1178 and appears in the Appendix hereto. The opinion of the District Court for the Southern District of Ohio, Eastern Division, which is unreported, also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 30, 1971. On February 18, 1972, this Court ordered that the time for filing a petition for writ of certiorari in the instant cause be extended to and including April 28, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* exempt the automobile insurance industry in Ohio from the Sherman Anti-trust Act simply because the State of Ohio has a statute purportedly regulating said industry?

2. On a motion to dismiss a complaint alleging Sherman Act violations relating to the automobile insurance price fixing, does the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, grant immunity to the defendants as a matter of law in the face of factual allegations, supported by affidavits, that the state does not "effectively" regulate the industry?

3. On a motion to dismiss a complaint alleging Sherman Act violations relating to automobile insurance price fixing, does the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, grant immunity to the defendants as a matter of law in the face of factual allegations supported by affidavit that demonstrate that the legislative scheme is "mere pretense" and that the state has in fact abdicated its function in favor of regulation by the industry itself?

STATUTES INVOLVED

15 U.S.C. § 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulations or taxation of such business by the several States. Mar. 9, 1945, c. 20, § 1, 59 Stat. 33.

15 U.S.C. § 1012. Regulation by State Law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, *shall be applicable to the business of insurance to the extent that such business is not regulated by State law*. Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448. (Emphasis added.)

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked because a question arises under the Sherman Anti-Trust Act, 15 U.S.C. § 1, *et seq.*, and the McCarran-Ferguson Act, 15 U.S.C. § 1012. This suit was filed against the Insurance Rating Board, (hereinafter IRB), one of its members, United States Fidelity and Guaranty, (hereinafter USF&G), and the Ohio Superintendent of Insurance.

The Complaint alleged violation of the Sherman Anti-Trust Act by combination and conspiracy in the fixing of the price of automobile insurance premiums charged to the consuming public; that rate increases were unilaterally instituted by the IRB in Ohio in 1965, 1966, and 1968 for automobile liability and property damage insurance without any state regulation; and that although the petitioners herein challenged the 1965 rate increase before the Department of Insurance, it was held by the Ohio Court that the petitioners could not challenge an automobile insurance rate increase.

In the district court, the defendants, IRB and USF&G, moved to dismiss on the grounds of lack of subject matter jurisdiction in that court due to the exemption of insurance industry from anti-trust laws by the McCarran-Ferguson Act 15 U.S.C. § 1012.

The trial court found that two issues were presented by the pleading:

> Plaintiffs argue that 'regulation' means '*effective*' regulation . . . .
>
> Plaintiffs further argue that when statutory provisions are a 'mere pretense' they do not constitute regulations of the business of insurance. (Opinion and Order Trial Court P. 28, *infra.*)

The lower court found that Ohio has a statute that purports to regulate insurance, and, therefore, held that it lacked jurisdiction of the subject matter under the McCarran-Ferguson Act and granted the motion to dismiss. Its decision was affirmed by the Court of Appeals for the Sixth Circuit.

The Complaint (P. 17, *infra*) alleged among other things that:

> "On July 8, 1968, the Insurance Rating Board by its unilateral action of filing a rate increase, raised automobile insurance premiums charged by its members, subscribers and affiliates throughout the state of Ohio, all without any state regulation to the detriment of the members of the Ohio AFL-CIO, Ira Thompson, and all others similarly situated." (Complaint para. 4)

In addition to the allegation of the unilateral increase by the insurance industry, the plaintiffs further alleged that the foregoing illegal activity was but the last act in a continuous pattern of illegal price fixing dating back to 1948 to:

> ". .fix the prices upon which automobile liability and collision insurance shall be sold throughout Ohio and other several states." (Complaint para. 13)

The Ohio insurance statutes are alleged to be a mere "pretense" and not regulation:

> ". . . each rate filing becomes effective immediately upon its filing and is deemed to comply with such sections of the Ohio Code as relate to insurance rate making unless such filing is later disapproved by the Superintendent of Insurance." (Complaint para. 17)
>
> ". . . that such rate increases have never been challenged by the Ohio Department of Insurance." (Complaint para. 18)

> "... insurance companies engage in discriminating actions by determining certain classes of people and certain geographical areas where they will not write automobile insurance coverage..." (Complaint para. 24)

> "... the state agency serves only as a repository for the rate filings." (Complaint para. 22)

The Complaint alleged that the public is afforded no opportunity for judicial review but that the courts of the state are open only to an insurance company to challenge a rate change.

The plaintiffs further alleged that if a general policy did exist under Ohio law, it had not been enforced, and the state had abdicated its function of regulating the automobile insurance industry in favor of regulation by the automobile insurance industry itself. (Complaint para. 19)

Despite these specific factual allegations of "mere pretense" and the finding of the trial court the Court of Appeals found that:

> The pertinent question before him on the Motion to Dismiss was the existence in Ohio of a statutory scheme of regulation sufficient to satisfy the McCarran Act *and not how the scheme worked in actual practice.*

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Section 1012 of the McCarran-Ferguson Act provides, in part, that the Sherman Anti-Trust Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The absence of a blanket exemption should be considered in light of settled law that immunity from the anti-trust law is not lightly implied. *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

In *FTC v. National Casualty Company*, 357 U.S. 560 (1958), the court acknowledged that "regulation" which is "mere pretense" is insufficient. The Court pointed out that *"Petitioner does not argue that the statutory provisions here under review were mere pretense."*

Clearly, in the present case, the "sham and pretense" argument is made. How else can one construe the allegations of unilateral price increases in insurance rates year after year without state challenge? Or, an allegation that the Department of Insurance does not employ an actuary so as to be able to examine rate filings? Or, an allegation that the public may not challenge a rate increase in court? Or, an allegation that the state has abdicated its function of regulating in favor of the industry regulating itself?

The Ohio law provides that the rate filing becomes effective immediately upon filing and is *deemed* to comply under the sections of the Ohio Code relating to insurance rate making unless later disapproved by the Super-

intendent of Insurance. Ohio has what is called a "file and use" law.[1] This system is characterized as being substantially the same as the automobile *insurance industry's freedom from regulation which previously has existed in Ohio. Rose, Regulation of Property and Casualty Insurance Rates*, 32 Ohio St. L.J. 487, 492 (1971).

Clearly, in enacting the McCarran-Ferguson Act, as stated in *SEC V. National Securities, Inc.*, 393 U.S. 453, 458-59 (1969), "Congress was mainly concerned with the relationship between insurance rate making and the antitrust laws . . ."

As observed by *Rose, supra* at 499:

> "In deciding to permit concerted action through rate bureaus and advisory organizations under the umbrella of the McCarran-Ferguson Act, Ohio and most other states validated an activity through which, in the absence of public control, industry members may collusively fix prices and secure excessive rates. These excessive rates may be reflected not only in the magnitude of profits, but also in the size and nature of operating expenses passed on to the public through rates."

Under the Ohio "system", in over twenty (20) years, the Department of Insurance has conducted only seven (7) hearings: *Rose, supra*, 510 n. 103. Apparently, only one of the seven (7) hearings, the challenge by petitioners herein to the rates instituted in 1966 by the rating bureau, involved a challenge to the rate which was instituted.

---

[1] Rose, Ohio St. L. J. 487, 492 n. 33 states: Prior to adoption of file-and-use, casualty insurance rates were unregulated. Purportedly, the absence of regulation was because competition was the rule rather than the exception for casualty insurance (particularly in the automobile lines). In addition, casualty insurance was a relatively insignificant form of coverage during the first half of the twentieth century. *See* E. PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES 268-69 (1927); Mertz, *The First Twenty Years—A Case-Law Commentary on Insurance Regulation Under the Commerce Clause*, 1963-64 PROCEEDINGS, ABA-INSURANCE SECTION 151-61; Moser, *Operation of Independents Under the Rate Regulatory Pattern*, 15 LAW & CONTEMP. PROB. 523, 526-27 (1950).

It is the contention of petitioners that the provisions of the McCarran-Ferguson Act exempting the business of insurance from anti-trust laws "to the extent that such business is not regulated by State law" mandates a requirement of regulation that is more than a mere pretense.

An examination of the legislative history of the McCarran-Ferguson Act is revealing.

Senator Barkley:

> If any state, through its legislature, undertakes to go through the form of regulations merely to put insurance companies within that state on an island of safety from Congressional legislation, that effort will be futile. 91 Cong. Rec. 1488 (1945).

Attorney General Biddle:

> The view we hold toward insurance is not unlike our policy toward railroad rates, that the fixing of rates by private groups *without active definite state approval is clear contravention* not only of the Sherman Act but also of the whole theory which underlies the Act, the theory that competition should be free unless it is specifically regulated by the appropriate body. . . . I think there is no doubt at all that insurance rates which are approved by a state are not subject to the Sherman Anti-Trust Act. By that I mean that if a group of insurance companies agreed on rates and filed them with a state commission, *and that body took active and definite action, made active and definite approval of those rates* (italics supplied) in that case I think the matter would not be involved at all in the Sherman Act. Quoted by Orfield, Improving State Regulation of Insurance, 32 Minn. L. Rev. 219, 225-7 (1948).

President Roosevelt (upon signing Public Law 15):

> . . . the anti-trust laws . . . will be applicable in full force and effect to the business of insurance except

> to the extent that the states have assumed the responsibility, *and are effectively performing that responsibility,* (italics supplied) for the regulation of whatever aspects of the insurance business may be involved. . . . Congress did not intend to permit private rate fixing, which the anti-trust acts forbid, but was willing to permit actual regulation of rates by affirmative action of the states. White House Release March 10, 1945, quoted in *Donovan, Regulation of Insurance Under the McCarran Act,* 15 Law & Contemp. Prob. 473, 478 (1950).

The Senate debate on the McCarran-Ferguson Act shows that Congress intended and believed that actual or real rejection of rates was required.

The following excerpt is from the debate on the conference committee report:

Senator Ferguson:

> . . . insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply.

Senator O'Mahoney:

> I believe the Senator from Michigan went a little further than was his intention when he said that if the States have legislated certain things will take place. *The bill says if the States have regulated.* (Emphasis added.)

* * * *

Senator Barkley (Kentucky):

> I should like to ask, in this connection, whether, where States attempt to occupy the field—but do it inadequately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, it is the

Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these acts still would apply?

Senator McCarran:

That is my interpretation.

91 Cong. Rec. at 1442-44

After the Act's passage, Senator O'Mahoney said:

It will not be sufficient merely to announce the principle or to pass laws in the several states which formally assert state authority. *If there is to be state regulation, the states must have insurance departments which are competent to regulate, that is to say, which are competent to examine, audit, and understand the complexities of the insurance business".* Address before the Insurance Federation of New York, December 5, 1945, quoted in Orfield, Improving State Regulation of Insurance, 32 Minn. L. Rev. 219, 227 (1948).
(Emphasis added.)

That Congress regarded effective enforcement of a state statute as a prerequisite of anti-trust immunity is also inferable from its rejection of the Walter-Bailey-Van Nuys Bill. The aforesaid bill would have exempted the insurance industry completely from federal anti-trust laws.

A Justice Department survey revealing that one-half of the states where Rating Bureaus operated had inadequate provisions for regulating insurance companies, thereby leaving the public at the mercy of price-fixing combinations that are illegal under the Sherman Act, is one reason the bill did not pass. (See Joint Hearing Before the Subcommittee of the Committee on the Judiciary

on S. 1362, H.R. 3269, and H.R. 3270, 78th Cong. 1st sess., 55-57 (1943).

If Congress was unwilling to place insurance rate making combinations entirely beyond the reach of the anti-trust laws, then it is unlikely that Congress intended to acquiesce in the states' practice of circumventing the anti-trust laws by passing deficient statutes or by failing to enforce adequate ones. For legal commentaries supporting this position see *Orfield, Improving State Regulation of Insurance*, 32 Minn. L. Rev. 219, 224 (1948); *Berge, Insurance and the Anti-trust Laws*, Proceedings of the Section of Insurance Law, American Bar Association 29, 34 (1946); *Sawyer, Insurance as Interstate Commerce*, 78-81 (1945); *Dineen, The Rating Problem, Proceedings of the Section of Insurance Law*. American Bar Association 104, 109-10 (1945).

It is the petitioner's position that the statutory standard in Ohio, if there is one, is a sham. The Sixth Circuit Court of Appeals in the instant case was impressed that Title 39 of the Ohio Revised Code sets forth a "scheme for the regulation of automobile liability and property damage insurance," 451 F.2d 1178, 1181. The Court notes, *id* at 1183, that at least once every five (5) years, rating organizations are required to be examined.

Despite this directive of examination, the Department of Insurance has examined only two (2) rate bureaus in the last five (5) years; it has conducted only six (6) examinations in twenty (20) years — *Rose, supra*, 51.

Ohio Revised Code Sections 3935.12 and 3935.09 give the Ohio Department of Insurance the right to examine "advisory organizations." The sub-committee on Anti-Trust and Monopoly of the United States Senate Committee on the Judiciary has reported that state insurance departments "have not been sufficiently aware of the

scope of the 'advisory organizations' activities;" S. Rep. No. 831, 87th Congress; 1st Sess. 124 (1961), yet the Ohio Department has never examined the advisory organizations or conducted any hearings to determine whether they have violated the law. *Rose, supra* at 495.

It is petitioner's further position that the State cannot merely enact a law and walk away. It cannot permit the insurance industry to fix its own rates at will. The allegation in the lower Court is that the State has abdicated its function of regulating insurance in favor of the insurance industry itself. The lower Court cannot disregard such allegation on the reasoning that there is a statute established by the State.

The State cannot nullify Federal anti-trust laws by authorizing private persons or groups subject to the anti-trust laws to do what such laws forbid.

In *Parker v. Brown,* 317 U.S. 341 (1943), the Court explicitly stated:

> a State does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.

In *Parker, supra,* after inquiry into the state law and the facts, the Court found that there was state regulation. The Court was talking about the *degree of actual participation* by the State in the rate making process. The Parker case clearly indicates that the Court has jurisdiction to examine the state legislation and to determine the degree of state participation.

As the Court in *Parker* concluded at 317 U.S. 350, 352:

> Although the organization of a pro-rate zone is proposed by producers and a pro-rate program, approved by the commission, must also be approved by referendum of producers, *it is the state* acting through the commission, *which adopts the program*

> and *which enforces it with penal sanctions*, on the execution of a governmental policy. (Emphasis added.)

Just as in *Parker, supra*, it was incumbent upon the District Court to look at the substance of the state regulation. Such an examination will demonstrate that the Ohio legislation authorizes the private combination of insurance companies through their Rating Bureau to fix rates for automobile insurance *without approval of any State authority*. Because of this lack of state activity or control, the defendants are amenable to the Sherman Act. The State simply cannot nullify the anti-trust laws by authorizing private persons or groups to do what such laws prohibit.

In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) the Court struck down the contention of immunity from anti-trust because of state legislation on the subject matter. In that case two distillers sought to enjoin Schwegmann Bros.'s from cutting retail prices on liquor products. The distillers, under the Louisiana Fair Trade Act's non signer clause, sought an injunction to stop the price cutting. The United States Supreme Court held that the action could not be maintained on the ground that the efforts of the distillers to impose price control upon an unwilling dealer amounted to a violation of the Sherman Anti-Trust Act even though authorized by State law.

In addition the Supreme Court has indicated that, with regards to insurance, it will look to the substance of the State Legislation and the regulation thereunder. In *Federal Trade Commission v. National Casualty Co.* 357 U.S. 560, 565 (1958) the Court noted:

> that each State has enacted prohibiting legislation which prescribed unfair insurance advertising and

> authorizes enforcement through a scheme of administrative supervision. Petitioner does not argue that the statutory provision here under review were *mere pretense*. (Emphasis added.)

The State Legislation is subject to the scrutiny of the federal judiciary to determine whether it is a mere pretense.

In *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 430 (1946), the first case after *Southeastern Underwriters*, the Court served notice that the *McCarran Act* was not a rubber stamp for State Legislatures to delegate to Rating Bureaus the governmental duty to regulate.

The legislative scheme chosen by Ohio is a naked delegation of public power to private interests. As such it must fail. Under that scheme, of which this Court must take judicial notice, the rate takes effect upon filing, remains in effect regardless of what the Insurance Superintendent may do, and makes no provisions for adjustment in the event the rate is ultimately found excessive. Likewise, no judicial review is provided to the public.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for the writ of certiorari should be granted.

Respectfully submitted,

STEWART R. JAFFY
Attorney for Petitioners

APPENDIX A

STATUTES INVOLVED

15 U.S.C. § 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

APPENDIX B

IN THE FEDERAL DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

[CAPTION OMITTED]

Civil No. 68-254

COMPLAINT

1. This action arises under a law to protect trade and commerce against restraints and monopolies, in particular (Title 15, U.S.C.), as herein after more fully appears. This is an action to enjoin violation of the Sherman Anti-Trust Act, 15 U.S.C. §1, *et seq.*, as hereinafter more fully appears. Jurisdiction is conferred upon this Court by 15 U.S.C. § 26.

2. The plaintiffs, OHIO AFL-CIO and The United Autoworkers of Ohio are a statewide organizations representing union members in the State of Ohio, many of whom are insured by companies covered by the automobile insurance rate increases put into effect by the Insurance Rating Board and its predecessor organizations, National Bureau Casualty Underwriters (N.B.C.U.) and National Automobile Underwriters Association (N.A.U.A.) and join the plaintiff, Ira Thompson, a policyholder of a member of the Insurance Rating Board, to bring this action on behalf of all automobile insurance policyholders in the State of Ohio who have been and will be affected by the automobile insurance increase rates. Numerous members of the OHIO AFL-CIO and The United Autoworkers of Ohio are aggrieved by the conduct of the defendant's as hereinafter set forth and are

in the same or similar position as is the plaintiff, Ira Thompson. The questions of law and fact raised herein are common to the class, the claims are typical of those in the class and the representative parties will fairly and adequately protect the interest of the class.

3. Ira Thompson, is a resident of the State of Ohio, City of Columbus, County of Franklin and is licensed by the State of Ohio to operate a motor vehicle and owns a duly licensed motor vehicle. In order to retain his operator's and motor vehicle licenses upon the city, county, state and interstate traffic arteries within the State of Ohio it is necessary that the plaintiff, Ira Thompson, have liability insurance upon his automobile or be in a financial position to post cash as financial security in the amount of any potential recovery in the event he should be involved in an automobile collision regardless of his fault under the laws of the State of Ohio.

4. Petitioners further state that on July 10, 1968, the Insurance Rating Board by its unilaterial action of filing a rate increase, raised automobile insurance premiums charged by its members, subscribers and affiliates throughout the State of Ohio, all without any state regulation to the detriment of members of the OHIO AFL-CIO, The United Autoworkers of Ohio, Ira Thompson and all others similarly situated

5. The plaintiff further states the defendant Insurance Rating Board is a non-resident association with its principal place of business in New York and is duly licensed to operate in this State as a rating bureau.

6. Petitioners state that the defendant, Insurance Rating Board, is composed of approximately 129 Insurance Companies which are members and subscribers, all of whom have started charging said new premiums on the aforesaid effective date.

7. The defendant United States Fidelity Guaranty Company is a duly licensed corporation with its principal place of business in Baltimore, Maryland and is authorized to do business in the State of Ohio, and is a member or subscriber of the Insurance Rating Board.

8. The plaintiff further states that the defendant Eugene Brown is the duly appointed, qualified, and acting Superintendent of Insurance for the State of Ohio.

9. The members and subscribers of the Insurance Rating Board other than those members specifically named party defendant are hereby sued as a class. They constitute a class of persons having identical interests in the subject matter of this action and are so numerous as to make it impracticable to bring them all before the court. Insofar as the character of the right sought to be enforced against them by this action is severable, the questions of law and fact affecting their several rights are common, and common relief is sought against them. The joinder of the Insurance Rating Board and The United States Fidelity and Guaranty Company hereinbefore specifically named as party defendants, will fairly insure the adequate representation of all other members and subscribers of the Insurance Rating Board.

10. The acts and conduct of the defendants and their co-participants, the members and subscribers of The Insurance Rating Board, hereinafter referred to constitute a combination and conspiracy to restrain trade and commerce and to fix rates in the automobile casualty insurance industry among the several states and to monopolize and attempt to monopolize a part of such trade and commerce.

11. It is further alleged that automobile liability insurance can only be acquired in the State of Ohio from

insurance companies duly licensed to do business in the State of Ohio.

12. Petitioners state that the aforesaid Insurance Companies write approximately 17% of the automobile liability insurance in Ohio and approximately 22% of the physical damage insurance written in the State of Ohio and through their rates and practices influence all automobile insurance rates charged throughout the State.

13. The sale of the liability insurance, liability and collision insurance policies on automobiles constitutes commerce among the several states. Beginning on or about the year 1948 and continuing without interruption thereafter to the filing of this complaint, defendant The Insurance Rating Board and its predecessors and its members and subscribers acting in concert with the various Departments of Insurance among the several states have violated and are now violating said Sherman Anti-Trust Act by unlawfully contracting, combining and conspiring to restrain trade in commerce among several states in the business of automobile casualty insurance and by unlawfully contracting, combining and conspiring to control, regulate and dictate terms and fix the prices upon which automobile liability and collision insurance shall be sold throughout Ohio and the other several states.

14. Petitioners further state that this is the third unilateral rate increase instituted by The Insurance Rating Board for its members and subscribers in the last three years without state regulation by concerted action in violation of the Sherman Anti-Trust Act; that this rate increase amounts to an increase on a statewide average of 7.9%; that the November 1966 rate increase was a statewide average increase of approximately 13.5% for bodily injury and property damage; that the

1965 rate increase was a statewide average increase of 4.4% for bodily injury and property damage; that similarly collision rate coverages were also increased in the aforesaid years.

15. Petitioners further state that the predecessors to the Insurance Rating Board, the N.B.C.U. and the N.A.U.A., raised the automobile insurance premiums in November 1966; that said rate increase was challenged by the OHIO AFL-CIO and Ira Thompson, petitioners herein; that the Ohio Court of Common Pleas has ruled that under Ohio law your petitioners may not appeal to the courts of the State of Ohio to challenge the automobile insurance rate increases and that the courts of the state are only open to an insurance company to challenge a rate change; that the aforesaid case is presently pending on the procedural question of right to appeal in an Ohio Court of Appeals; that since November 1966 the people of the State of Ohio have paid the higher rate put into effect by the concerted efforts of the predecessors to the Insurance Rating Board, its members and subscribers and the Department of Insurance, and continued to pay such increase until the new increase was made effective by the Insurance Rating Board on July 10, 1968.

16. Said unlawful conspiracy to monopolize, and the combination and conspiracy to restrain trade in commerce in the business of casualty insurance has consisted of a continuing agreement among defendants, The Insurance Rating Board and its members and subscribers, the substantial terms of which and the means of such concert of action are as follows:

(a) that defendant member and members and subscribers of The Insurance Rating Board make contracts agreeing to sell automobile insurance

policies to the public at rates which are to be fixed by The Insurance Rating Board.

(b) the defendant Insurance Rating Board makes a filing with the Ohio Department of Insurance of such proposed rate which takes effect immediately upon said filing contrary to the mandate of the McCarran-Ferguson Act which provides that the business of insurance must be regulated by the State.

(c) by setting out underwriting standards which have no reasonable relation to risk thereby causing enumerable individuals to pay more for insurance than other persons who present essentially the same risk to the insurer, thereby causing enumerable persons to be blacklisted from the insurance market place.

17. Plaintiffs further allege that under Ohio law each rate filing becomes effective immediately upon its filing and is deemed to comply with such sections of the Ohio Code as relate to insurance rate making unless such filing is later disapproved by the Superintendent of Insurance.

18. Petitioners further state that under Ohio law, Revised Code Chapter 3937, The Insurance Board, its members and affiliates and other insurance companies are permitted to set the effective date of any rate increases they desire to institute; that such rate increases become effective immediately upon the date set by said insurance companies; that such rate increases have never been challenged in Ohio by the Ohio Department of Insurance or anyone except the petitioners herein. The Department does not even employ or have on its staff an actuary so as to be able to examine the rate filing.

19. Petitioners further state that there is an absence of State regulation, and no effective or appropriate state regulation and that the State of Ohio has abdicated its function of regulating the automobile insurance industry in favor of regulation by the automobile insurance industry itself.

20. Plaintiffs state that under the McCarran-Ferguson Act, Public Law 15, 1945, 15 U.S.C. § 1011, the federal law known as the Sherman Anti-Trust Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law".

21. Plaintiffs further state that the Insurance Rating Board and its members and affiliates are engaged in the co-operative making of rates through a rate making Bureau without state regulation as alleged aforesaid; all in violation of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C. § 1 *et seq.* prohibiting price-fixing.

22. Plaintiffs further allege that the Ohio law pertaining to auto insurance rate making was fostered by the insurance industry, is designed to protect said insurance industry and to exempt it from federal anti-trust regulation and that it does not provide for state regulation and that the State Agency serves only as a repository for the rate filings.

23. Plaintiffs further say that the system fostered by the industry results in a race for the preferred risk and permits insurance companies to refuse to accept below average risks on a voluntary basis, thereby arbitrarily fixing prices for other risks.

24. Plaintiffs further state that under the present system insurance companies engage in discriminatory actions by determining certain classes of people and

certain geographical areas where they will not write automobile insurance coverage and by engaging in tactics of mass cancellation of automobile insurance policies.

25. Plaintiffs further state that the insurance companies receive money in advance of periods of time when they actually earn said money by providing insurance coverage and hold said monies in trust for the policyholder in reserves called unearned premium reserves, and also hold the policyholders money in loss reserves and invest said monies, but do not in their computation of rates reflect any interest or dividends received from such monies in the determination of the rates to be charged; that this practice is not restrained or regulated under state law, permits a higher insurance premium to be charged and that such determination not to give an interest credit is a co-operative determination in violation of the Sherman Anti-Trust Act.

26. Plaintiffs further state that the Insurance Rating Board pools non-risk elements such as administrative expenses, acquisition cost and profit in determining the rates it will establish; that such rates are not uniform for all companies; that the rate established is weighted to protect the least efficient operator and is not regulated by the State; all in violation of the aforesaid Anti-Trust Law.

WHEREFORE, plaintiffs pray judgment as follows:

1. That said combination and conspiracy, contract, agreement, arrangement and understanding to restrain trade and fix rates, and said conspiracy to monopolize, attempt to monopolize trade and commerce be decreed unlawful, and in violation of the Sherman Anti-Trust Act.

2. That the Court decree that defendants have combined and conspired to restrain trade, to fix rates, to monopolize and attempt to monopolize interstate trade and commerce in the business of automobile casualty insurance in violation of the Sherman Anti-Trust Act.

3. That the Court issue a preliminary injunction restraining the defendant, Insurance Rating Board and its members and subscribers, from charging a rate other than the rate made effective in November 1966 during the pendency of this action.

4. That the defendant, Superintendent of Insurance, be enjoined from accepting any further filings for rate increases during the pendency of this action and that the defendant, Insurance Rating Board, be enjoined from filing any further rate increases in the State of Ohio during the pendency of this action.

5. That the defendants and each of them and their officers, directors, agents, representatives, and all persons and corporations, acting or claiming to act on their behalf, be perpetually enjoined from combining or conspiring or agreeing to restrain trade, to fix rates, to monopolize and attempt to monopolize trade and commerce in the automobile casualty insurance industry, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships, or understandings having the purpose or effect of continuing, reviving, or renewing the violations of the Sherman Anti-Trust Act hereinbefore set forth.

6. That the Court award treble damages and other statutory benefits to the plaintiffs.

7. That plaintiffs recover their costs herein and have such other relief as the Court may deem proper.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

OHIO AFL-CIO, et al,

Plaintiffs,

vs.

THE INSURANCE RATING BOARD, et al,

Defendants.

Civil Action 68-254

OPINION AND ORDER

This matter is before the Court on the motion of the defendants, The Insurance Rating Board and the United States Fidelity and Guaranty Company, to dismiss on the ground that the Court lacks jurisdiction over the subject matter of the action.

The complaint alleges that jurisdiction arises under the provisions of the Sherman Act, 15 U.S.C.A., § 1, *et seq.* The complaint further alleges that on July 10, 1968, in accordance with the provisions of Chapter 3937, Ohio Revised Code, The Insurance Rating Board, a group of 129 insurance companies, "by its unilateral action of filing a rate increase, raised automobile insurance premiums charged by its members, subscribers and affiliates throughout the State of Ohio, all without any state regulation to the detriment of" plaintiffs.

The complaint asserts defendants' actions "constitute a combination and conspiracy to restrain trade and commerce and to fix rates in the automobile casualty insurance industry among the several states and to monopolize and attempt to monopolize a part of such trade and commerce."

Defendants contend the Sherman Act is inapplicable because the business of insurance, including insurance rates, is regulated by Ohio law and is thus exempt from federal anti-trust laws by the McCarran Act, 15 U.S.C.A., §§ 1011 through 1015. Plaintiff contends the business of insurance is not regulated by Ohio law and is therefore subject to the provisions of the Sherman Act.

The McCarran Act contains the following relevant provisions:

§ 1011 Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest. . . .

§ 1012 **(a)** The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair or supersede any law by any state for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance: *Provided,* that . . . the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

In *United States* v. *Southeastern Underwriters Association,* 322 U.S. 533 (1944) the United States Supreme Court held the business of insurance was in or affecting interstate commerce and that it was subject to the provisions of the Sherman Anti-Trust Act. The very next year Congress passed the McCarran Act. The United States Supreme Court upheld the constitutionality of

the McCarran Act in *Prudential Insurance Co.* v. *Benjamin,* 328 United States 408 (1946).

The issue before the Court is whether, assuming the factual allegations of the complaint to be true, Ohio "regulates" the business of insurance within the meaning of the McCarran Act.

Plaintiffs argue that "regulation" means *effective* regulation. In support of the position, plaintiffs assert automobile liability insurance is virtually compulsory, creating a seller's market. Congress, knowing the monopolistic tendency of such a market, must have intended that only effective regulation should exempt the business of insurance from the Sherman Anti-Trust Act.

Plaintiffs further argue that when statutory provisions are "mere pretense" they do not constitute regula- of the business of insurance. *Cf., Federal Trade Commission* v. *National Casualty Co.,* 357 U.S. 560, 564 (1958). Plaintiffs assert that Chapter 3937, Ohio Revised Code, and the history of the operation under Chapter 3937, prove Ohio does not regulate the business of insurance.

Plaintiffs allege the Superintendent of Insurance's staff is inadequate to review information relating to rate changes, and that the Superintendent of Insurance has never challenged a rate increase filed by the Insurance Rating Board contrary to the practice in other states.

The Ohio statutory scheme relating to casualty insurance is as follows:

1. Rating organizations, such as The Insurance Rating Board, are licensed by Ohio under the provisions of § 3937.05, Ohio Revised Code. These are voluntary associations comprised of insurers. The Superintendent of Insurance is required to examine each rating organization at least once every five years. § 3937.11, Ohio Revised Code.

2. Each rating organization files the manuals of classifications, rules, rates and rating plans which it proposes to use with the Superintendent.[1] Each filing becomes effective immediately upon its filing and is deemed to comply with Chapter 3937 unless disapproved by the Superintendent. § 3937.03, Ohio Revised Code.

3. The casualty rates must comply with statutory standards, including the requirement that they "shall not be excessive, inadequate, or unfairly discriminatory." § 3937.02, Ohio Revised Code.

4. If the Superintendent of Insurance determines the rates do not comply with Chapter 3937, Ohio Revised Code, he may, after a hearing, issue an order nullifying the new rates. § 3937.04, Ohio Revised Code.

5. The Superintendent's disapproval of a rate does not affect policies issued prior to his order of disapproval. § 3937.04, Ohio Revised Code. Moreover, if an insurer appeals the Superintendent's order, the order does not go into effect until after the appeal has been finally adjudicated. § 3937.15, Ohio Revised Code. Thus, a rate filed by a rating organization may remain in full force and effect for a substantial period of time following the Superintendent's disapproval.

6. Chapter 3937 makes several provisions for appeal to the Superintendent.
   a. The rating organization is entitled to a hearing if the Superintendent determines the rates do not comply with Chapter 3937. § 3937.04, Ohio Revised Code.

[1] If an insurer is not a member or subscriber of a rating organization, he may file his rates in the same manner as a rating organization. §3937.03, Ohio Rev. Code.

b. "Any person . . . aggrieved with respect to any filing" may request the Superintendent to hold a hearing. § 3937.04, Ohio Revised Code.

c. Any member or subscriber to a rating organization may appeal to the Superintendent from a decision of or action taken by a rating organization. § 3937.07, Ohio Revised Code.

d. An insured may request "all pertinent information" with respect to a rate from a rating organization and a review of the rate. If the rating organization fails to grant or reject the request within 30 days, the insured may appeal to the Superintendent. § 3937.08, Ohio Revised Code.

7. If a rating organization fails to comply with an order of the Superintendent, he may suspend the license of the rating organization. § 3937.16, Ohio Revised Code.

8. "Any order or decision of the Superintendent [under Chapter 3937] is subject to review by the courts" of Ohio. § 3937.15, Ohio Revised Code.[2]

In construing these provisions, the Court must consider the following declaration of legislative intent:

> [Chapter 3937] shall be liberally interpreted to the end that insurance rates shall not be excessive, inadequate or unfairly discriminatory, and cooperative action among insurers in rate making and in other matters within the scope of such sections shall be authorized and regulated. . .

The Ohio statutory scheme does not provide for rates set independently by an officer of the state, nor does it

[2] *But cf., Lynch v. Insurance Rating Board*, Civ. No. 5205, Franklin County Common Pleas Court, December 4, 1968.

provide that rating organizations merely make *recommendations* which can be adopted or rejected by an officer of the state. Plaintiffs assert that such statutes are models of true regulation, as opposed to Ohio's ineffective regulatory scheme.

A court is not empowered to make a policy judgment as to the type of regulation which is desirable. The Ohio Legislature has adopted a statutory scheme which sets standards for insurance rates. This Court is not concerned with the wisdom of the standards, but with the limited question of whether or not the legislation is regulation under the McCarran Act.

A legislature has adopted a regulatory scheme if the statute "generally [prohibits] certain standards of conduct." See, *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. at 564. Ohio has provided general standards for the operation of the business of insurance and procedures for effectuating these standards. Thus, Ohio regulates the business of insurance within the meaning of 15 U.S.C.A. §§ 1011 through 1015. See, *Allstate Ins. Co.* v. *Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965), *aff'd.* 361 F. 2d 870 (4th Cir. 1966); *California League of Ind. Ins. Producers* v. *Aetna Cas. & Surety Co.*, 175 F. Supp. 857 (N.D. Calif. 1959).

Sections 1010 and 1011 of the McCarran Act provide that an action under the Sherman Act will not lie when the business of insurance is regulated by a state. Therefore, this Court lacks jurisdiction over the subject matter of this action.

WHEREUPON, the Court holds the motion is meritorious and therefore IT IS GRANTED.

This action is hereby DISMISSED.

JOSEPH D. KINNEARY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

OHIO AFL-CIO, et al,

Plaintiffs,

vs.

THE INSURANCE RATING BOARD, et al,

Defendants.

Civil Action 68-254

ORDER

This matter is before the Court on the motion of the defendant, Eugene Brown, Superintendent of Insurance, State of Ohio, to dismiss on the ground that the Court lacks jurisdiction over the person of the defendant.

The Court has granted the motion to dismiss of the defendants The Insurance Rating Board and the United States Fidelity and Guaranty Company on the ground that the Court lacks jurisdiction over the subject matter of the action; therefore, it is unnecessary for the Court to consider the grounds alleged by this defendant.

Upon consideration and being fully advised, the Court determines it lacks jurisdiction over the subject matter of this action.

This action is hereby DISMISSED.

JOSEPH D. KINNEARY
United States District Judge

APPENDIX D

No. 71-1202

United States Court of Appeals

FOR THE SIXTH CIRCUIT

OHIO AFL-CIO, THE UNITED AUTOWORKERS OF OHIO, and IRA THOMPSON,
Plaintiffs-Appellants,
v.
THE INSURANCE RATING BOARD, UNITED STATES FIDELITY AND GUARANTY COMPANY, and EUGENE BROWN,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided and Filed November 30, 1971.

Before: PHILLIPS, Chief Judge, McCREE and MILLER, Circuit Judges.

MILLER, Circuit Judge. This is an antitrust action instituted by Ohio AFL-CIO, The United Autoworkers of Ohio, and Ira Thompson as a licensed automobile operator in Ohio carrying automobile liability insurance, against the Insurance Rating Board (IRB), one of its members, United States Fidelity and Guaranty Company (USF&G), and Eugene Brown, the Ohio Superintendent of Insurance, alleging violations of the Sherman Antitrust Act by a combination and conspiracy in the fixing of prices of automobile insurance premiums. It is alleged that rate increases were instituted by the IRB

in Ohio in 1965, 1966 and 1968 on a state-wide average for automobile liability insurance of 4.47%, 13.5% and for automobile liability and property damage of 7.9%, respectively, without any state regulation.

The complaint seeks injunctive relief against the charging of rates other than the rates made effective in November 1966, against the acceptance of any further filings for rate increases during the pendency of the action, and against any combination or conspiracy to restrain trade or to monopolize trade and commerce in violation of the Sherman Antitrust Act. There is also a claim for treble damages and other statutory benefits.

There are general allegations in the complaint to the effect that the IRB and its predecessors and its members and subscribers acting in concert with various departments of insurance among the several states have violated and are now violating the Sherman Antitrust Act by unlawfully contracting, combining and conspiring to restrain trade in interstate commerce with respect to the business of automobile casualty insurance and by unlawfully contracting, combining and conspiring to control, regulate and dictate terms and fix the prices upon which automobile liability and collision insurance shall be sold throughout Ohio and other states.

It is alleged that the IRB is composed of 129 insurance companies which are members and subscribers, all of whom have started charging increased premiums approved by the IRB on July 10, 1968, for automobile insurance "all without any state regulation to the detriment of the members of the Ohio AFL-CIO, the United Autoworkers of Ohio, Ira Thompson, and all others similarly situated." It is further alleged that the insurance companies having membership in the IRA write approximately 17% of the automobile liability insurance in Ohio

and approximately 22% of the physical damage insurance in that state and "through their rates and practices influence all automobile insurance rates charged throughout the state." The complaint proceeds to allege further that under Ohio law, Revised Code Chapter 3937, the IRB, its members and affiliates and other insurance companies are permitted to set the effective date of any rate increases that they desire to institute; that such rate increases become effective immediately upon the date set by the said insurance companies; that such rate increases have never been challenged in the State of Ohio by the Department of Insurance or by any one except the plaintiffs; and that "the Department does not even employ or have on its staff an actuary so as to be able to examine the rate filing." *In essence the complaint is that there is an absence of state regulation in Ohio and that that state has abdicated its function of regulating the automobile insurance industry in favor of regulation by the automobile insurance industry itself.* The defendants, IRB, USF&G, and the Superintendent of Insurance, moved to dismiss the complaint on the ground of lack of jurisdiction of the Court because of the exemption of the business of insurance from the operation of the antitrust laws provided for by the McCarran Act, 15 U.S.C. Sec. 1011. In the alternative, they moved for dismissal of the complaint for failure to state a claim on which relief could be granted and for summary judgment on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

The district court in its opinion held that the Ohio statutory scheme for regulating the business of insurance *constituted regulation within the meaning of 15 U.S.C. Sec. 1012(b)*, providing that the antitrust laws "shall be

applicable to the business of insurance to the extent that such business is not regulated by state law." Answering the plaintiffs' argument that the Ohio scheme of regulation was not effective and therefore could not be deemed to constitute the kind of regulation contemplated by the McCarran Act, the district court stated: "A court is not empowered to make a policy judgment as to the type of regulation which is desirable. The Ohio legislature has adopted a statutory scheme which sets *standards* for insurance rates. This court is not concerned with the wisdom of the standards but with the limited question of whether or not the legislation is regulation under the McCarran Act."

Citing *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 564, the court held that Ohio had provided general standards for the operation of the business of insurance and consequently that Ohio had "regulated" the business of insurance within the meaning of the statutory exemption. Pursuant to this opinion the *court dismissed the complaint for lack of jurisdiction of the subject matter* without considering the alternative motion for summary judgment: On appeal, the principal issue before us is whether the district court was correct in its conclusion that Ohio regulated the business of automobile insurance so as to qualify for the McCarran Act exemption.

Upon consideration of the applicable Ohio statutes we conclude that the business of insurance in Ohio is "regulated" to the extent contemplated by the McCarran Act.

The Supreme Court in *Paul* v. *Virginia*, 8 Wallace 168 (1868), held that the transaction of insurance business does not constitute interstate commerce and that the states were therefore free to subject such business to state regulation. See also *Hooper* v. *California*, 155 U.S.

648, 655 (1895), and *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U.S. 495, 510 (1913). Consequently, the insurance business was extensively regulated by the various states. In 1944, however, the court in *United States* v. *Southeastern Underwriters Association*, 322 U.S. 533, re-examined this question and came to the conclusion that an insurance company conducting a substantial part of its business across state lines is engaged in interstate commerce and is subject to regulation by Congress under the Commerce Clause of the Constitution. In consequence it was held that the Sherman Antitrust Act is applicable to the business of insurance. Reacting to this decision, Congress enacted legislation in 1945 and 1947, declaring that it was in the public interest for the business of insurance to continue to be regulated by the several states and specifically exempting such business from the operation of the antitrust laws to the extent that such business is regulated by state law. 15 U.S.C. Secs. 1011 and 1012.[1]

In *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429-430 (1946), it was held that the purpose of Congress in enacting the McCarran Act was broadly to "give support to the existing and future state systems for regulating and taxing the business of insurance." A number of authorities have considered the question of what constitutes "regulation" within the meaning of the McCarran Act so as to activate the McCarran Act exemption. Without examining these cases in detail, none of which has failed to apply the exemption, we think the United States

[1] 15 U.S.C. Sec. 1012(a) provides that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation of taxation of such business." Sec. 1012(b), commonly referred to as the McCarran Act, provides in pertinent part that various antitrust statutes shall be applicable to the business of insurance "to the extent that such business is not regulated by state laws."

District Court for the Northern District of California made a correct statement of the law in *California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co.*, 175 F. Supp. 857, 860 (1959), when it said:

> This Court is of the opinion that a State regulates the business of insurance within the meaning of Sec. 1012(b) when a State statute *generally proscribes* (F.T.C. v. National Cas. Co., 1958, 357 U.S. 560, 78 S.Ct. 1260, 2 L. Ed. 2d 1540) or *permits or authorizes certain conduct on the part of the insurance companies.* In F.T.C. v. National Cas. Co., supra, the Court held that there was State regulation within the meaning of § 1012(b) when a State act generally prohibited "certain standards of conduct." 357 U.S. at page 564, 78 S. Ct. at page 1262. From the above case it would seem to follow that if a state has generally authorized or permitted certain standards of conduct, it is regulating the business of insurance under the McCarran Act.

Examining the applicable Ohio statutes, we find that the state has adopted a *comprehensive scheme* for the regulation of automobile liability and property damage insurance, although concededly its scheme might not be as extensive or as stringent as some of the other states. The conclusory statements of the complaint in this case that Ohio has not regulated this type of insurance business or that it has not effectively done so are, in our view, untenable.

The McCarran Act does not define the term "regulation" and no satisfactory definition is to be derived from its legislative history. Nevertheless, we are convinced that the controlling test is that stated by the District Court for the Northern District of California in the *Aetna Casualty* case cited above, i.e., whether the state has "generally authorized or permitted certain standards

of conduct." Title 39, Chapters 3901 to 3999 of the Revised Code of Ohio, sets forth a comprehensive scheme for regulating practically all aspects of the business of insurance as transacted in that state. This includes the creation of a department of insurance, establishment of the office of superintendent of insurance, provision for appointment of employees for prompt dispatch of business, the granting of specific powers to the superintendent, including the power of inquiry, investigation and examination of insurance companies, and generally the regulation of the business of insurance. The organization of insurance companies of various kinds, domestic and foreign, are provided for. The statutes provide for the liquidation of insurance companies, the regulation of insurance agents, and the definition of investments which insurance companies may legally make. Crucial to the present case is the fact that the Ohio statutes have specifically provided for the regulation of rating organizations such as IRB, and the making, filing and use of rates for casualty insurance, including motor vehicle insurance. Chapter 3937. Each member or subscriber to a rating organization is *required to adhere* to the rate filing made on its behalf by such organization. 3937.06. As to filed rates, every member and subscriber has the right by and in accordance with the *statute to deviate* from such filed rates. 3937.06. Cooperative action among insurers in ratemaking and in other matters within the scope of the statute is authorized and regulated. Chapter 3937.17 provides that the chapter pertaining to casualty motor vehicle insurance shall be liberally interpreted to the end that insurance rates shall not be excessive, inadequate, or unfairly discriminatory. Sec. 3937.02 sets forth in specific terms the criteria which shall govern all casualty rates. Every insurer is

required to file every rate which it intends to use and the information with which the insurer supports such filing if the superintendent does not have it. Sec. 3937.03(A). Each filing becomes effective immediately upon its filing and is deemed to comply with such sections unless disapproved by the superintendent as provided in Sec. 3937.04 of the Revised Code. Sec. 3937.03(C). Insurance companies are prohibited from issuing a contract or policy except in accordance with filings which are in effect for the insurer. 3937.03(H). The superintendent is authorized to cancel any contract if at any time he finds after a hearing on notice that the rate does not comply with the statutory requirements. Sec. 3937.04(A). Such a hearing may be brought about upon written application of "any person or organization aggrieved with respect to any filing which is in effect," 3937.04(B), and a reasonable inference from the statute is that the superintendent himself may review any filings on his own initiative. While insurers may satisfy their obligation to file the rates which they intend to use by becoming a member of or a subscriber to a licensed rating organization which makes such filings, the statutes do not require any insurer to become a member of or a subscriber to any rating organization. 3937.03(B). Members and subscribers to rating organizations may file a uniform percentage decrease or increase in rates filed for them by the rating organization. 3937.06. Rating organizations themselves under Ohio law are required to be licensed and to apply for such license in accordance with the procedure outlined in 3937.05. The license is issued only after a finding by the Superintendent of Insurance that the applicant is competent, trustworthy and qualified otherwise to act as a rating organization and that its constitution, articles of agreement or association

. . . and its by-laws, rules and regulations governing the conduct of its business conform to the law . . . . 3937.-05(A) (4). Although cooperation among rating organizations or among rating organizations and insurers in rate-making is expressly authorized, the superintendent may review such cooperative activities and, after hearing, direct the discontinuance of any activity which he feels to be unfair, unreasonable or otherwise inconsistent with statutory regulations. 3937.05(D). Extensive provisions are made to protect the right of members and subscribers of rating organizations relative to reasonableness of activities by the rating organization affecting the member or subscriber and providing for appeals to the superintendent. Secs. 3937.05(B); 3937.07. Both rating organizations and insurers making their own rates are required to furnish to any insured affected by a rate made by it any pertinent information as to such rate and to grant a hearing to such insured if requested. The decision of the rating organization as to its rating system is subject to appeal to the superintendent. 3937.08. At least once in every five years rating organizations are required to be examined, 3937.11, and the officers, agents and employees of the organization may be examined at any time and shall exhibit all books, records, accounts, documents, or agreements governing its method of operation. Other provisions regulate different aspects of automobile insurance in Ohio, but we think that the provisions cited demonstrate beyond doubt that the business of insurance in Ohio is comprehensively and effectively "regulated" so as to qualify such business for the McCarran Act exemption.

Appellants point to certain alleged deficiencies in the Ohio scheme of regulation. For example, it is argued that under the Ohio statutes each filing becomes effective

immediately and is deemed to comply with the law unless disapproved by the superintendent, with the result that the rating bureau may put a higher rate into effect without prior approval by the state department of insurance. It is pointed out that the Ohio statutes further provide that after filing the rate remains in effect until an appeal is finally adjudicated. Moreover, if the rates filed are disapproved by the superintendent, the order of disapproval does not affect any policy made prior to the expiration date specified in the superintendent's order. A further alleged defect is the apparent provisions that no order or decision of the superintendent is effective until after final action or decision by the court on judicial review. If it should happen that the highest court should hold that such rate is excessive, the insurance companies are allowed to retain the excessive amount received.

An ideal type of regulation may possibly envision the removal of the alleged deficiencies in the Ohio statutes referred to by the appellant. Yet the question before us is not whether the Ohio method of regulation compares favorably with the regulations of other states, or whether it is an ideal manner in which to regulate the business of insurance. We are confident that Congress in enacting the McCarran Act did not intend to impose a uniform standard of regulation upon all of the states. It is our view that the congressional intent was to leave to the judgment of each state the specifics of regulation which it should see fit to adopt. Suffice it to say at this point that we are confident that the comprehensive plan adopted by Ohio is fully adequate to meet the requirements of regulation contemplated by the McCarran Act.

It is interesting to note that since the passage of the McCarran Act a number of actions have been filed in

which the McCarran Act exemption has been examined in terms of state regulation of the business of insurance. Yet in no case has it been decided that the exemption was inapplicable because of a failure of state regulation. In this connection, see *North Little Rock Transportation Co., Inc.* v. *Casualty Reciprocal Exchange,* 85 F.Supp. 961 (E.D. Ark. 1949), *aff'd* 181 F.2d 174 (8th Cir.), *cert. denied* 340 U.S. 823 (1950); *California League of Ind. Ins. Producers* v. *Aetna Cas. & Surety Co.,* 175 F.Supp. 857 (N.D.S.D. Cal., 1959); *Allstate Insurance Co.* v. *Lanier,* 242 F.Supp. 73 (E.D. N.C. 1965), *aff'd* 361 F2d 870 (4th Cir. 1966), *cert. denied* 385 U.S. 930; and *Lynch* v. *Insurance Rating Board,* D.C. M.D. Tenn. No. 5202 unreported.

We find no support for the appellants' argument that the court in this case should inquire into the question as to whether the statutes of Ohio have been effectively enforced in accordance with their terms. As pointed out in the *Lynch case, supra,* there is nothing in the language *of the McCarran Act or in its legislative history to support the thesis that the Act does not apply when the state's scheme of regulation has not been effectively enforced.* The Senate Sub-Committee reviewing the intention of the McCarran Act has so interpreted the decision in the *National Casualty* case in a report which states in part as follows: (Report of the Senate Sub-Committee on Anti-Trust and Monopoly, "The Insurance Industry—Aviation, Marine and State Regulation," Rep. No. 1834, 86th Cong., 2d Sess. (1960) at p. 5):

> It now seems evident from this Supreme Court decision that the McCarran Act language, 'to the extent that such business is not regulated by State law,' restricts Federal authority regardless of whether the States are actively enforcing their reg-

> ulations. If the States have enacted regulatory statutes, *capable of being enforced within their borders,* the Federal antitrust laws would apparently not apply. In such cases, no proof would apparently be entertained as to the extent to which the law had been administratively enforced. It also seems doubtful the Court would permit a questioning as to the quality of the State regulatory law.

Moreover in the present case, while the appellants insisted in their appellate brief and in oral argument that the Ohio scheme is a mere "pretense" and "sham", no such language is employed in the complaint. The nearest thing to an allegation that the Ohio scheme was not enforced is the statement in the complaint that insurance rate increases have never been challenged in Ohio by the Department of Insurance and that the department does not employ an actuary so as to be able to examine rate filings. These statements do not necessarily establish a policy of non-enforcement in Ohio and certainly are insufficient to show that the regulation of insurance in that state is a mere "sham" or pretense."[2] It is true that the complaint contains a number of conclusory statements to the effect that the appellees are allowed to control insurance rates in Ohio without state regulation or with no regulation. These conclusions are not only in conflict with the elaborate statutory scheme prescribed by Ohio law, but in any event are not sufficient on a motion to dismiss for failure to state a claim to develop a factual issue which the appellees are required to meet.

As we have concluded that the State of Ohio has regulated the business of automobile insurance within the meaning of the McCarran Act exemption, it follows that

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[2] Cf. *Federal Trade Commission* v. *National Casualty Co.*, 351 U.S. 560, 564-65 (1960).

the district judge was correct in granting the motion to dismiss the complaint. It then became unnecessary for him to consider the motion for summary judgment for, as we have pointed out, the pertinent question before him on the motion to dismiss was the existence in Ohio of a statutory scheme of regulation sufficient to satisfy the McCarran Act and not how the scheme worked in actual practice.

Concluding, as we do, that the complaint failed to state a claim on which relief could be granted, it would not be proper to remand the action to the district court for consideration of any possible factual issues.

AFFIRMED.

Supreme Court, U. S.
FILED
JUL 19 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1386

OHIO AFL-CIO, THE UNITED AUTOWORKERS OF OHIO AND IRA THOMPSON,

Petitioners,

v.

THE INSURANCE RATING BOARD, ET AL.,

Respondent.

BRIEF FOR RESPONDENTS, INSURANCE RATING BOARD AND UNITED STATES FIDELITY AND GUARANTY COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RUDOLPH JANATA, of
WRIGHT, HARLOR, MORRIS & ARNOLD,
Counsel for respondents, The Insurance Rating Board and United States Fidelity and Guaranty Co.,
37 West Broad Street
Columbus, Ohio 43215

JOHN P. WALSH, of
DONOVAN, DONOVAN, MALOOF & WALSH,
Counsel for respondent, The Insurance Rating Board,
161 William Street
New York, New York 10038

WARREN A. HERLAND, on the brief

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1386

OHIO AFL-CIO, THE UNITED AUTOWORKERS OF OHIO and IRA THOMPSON,

Petitioners,

v.

THE INSURANCE RATING BOARD, UNITES STATES FIDELITY AND GUARANTY COMPANY and EUGENE BROWN,

Respondents.

BRIEF FOR RESPONDENTS, THE INSURANCE RATING BOARD AND UNITED STATES FIDELITY AND GUARANTY COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondents, The Insurance Rating Board and United States Fidelity and Guaranty Company, respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The opinions of the United States Court of Appeals and of the United States District Court are correctly set forth in the appendices to the Petition. (Petition Appendix D, pp. 33 et seq.; Petition Appendix C, pp. 26 et seq.)

However, respondents will also hereafter refer to and attach as appendices to their brief the decision by the defendant (below) Superintendent of Insurance of the State of Ohio, dated May 12, 1967, reviewing, at the demand of petitioners, the automobile insurance rates filed by the predecessors* of the respondent Insurance Rating Board (Appendix 1, attached), as well as decisions and opinions, on appeal therefrom by petitioners, rendered by the Court of Common Pleas, Franklin County, Ohio on April 3, 1968 (Appendix 2, attached), the Court of Appeals of Franklin County, Ohio dated August 26, 1969 (Appendix 3, attached) and by the Supreme Court of the State of Ohio dated January 28, 1970 (Appendix 4, attached).

These demonstrate, we respectfully submit, in this very case, the absurdity of petitioners' contention that there is no "regulation" of the business of insurance in Ohio because regulation under the Ohio insurance statutes is allegedly "ineffective" and an alleged "pretense". (Petition, p. 7).

Even if it were properly arguable by them that the Ohio administrative and judicial decisions were erroneous and unjust (and from this they sought no review beyond the Supreme Court of Ohio) their own case demonstrates that they have had the use of and involvement in extensive regulatory procedure.

Jurisdiction

The respondents do not question the review jurisdiction of this court.

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* The original respondents, National Bureau of Casualty Underwriters and National Automobile Underwriters Association were consolidated into respondent, Insurance Rating Board, effective January 2, 1968 (Court of Appeals Appendix, 17a).

Questions Presented

Respondents submit that petitioners' statement of the "Questions Presented" is somewhat confusing, and complicated by argumentative reference to affidavit allegations attempting to discredit the quality or genuineness of the regulation of insurance in Ohio.

The courts below decided, on the complaint, to grant the motion of defendants to dismiss "on the ground that the court lacks jurisdiction over the subject matter of the action" (Petition, 26) by reason of the fact that "the business of insurance, including insurance rates, is regulated by Ohio law and is thus exempt from federal anti-trust laws by the McCarran Act, 15 U.S.C.A., §§1011 through 1015" (Petition, 27).

The sole "Question Presented" is that framed in the District Court opinion as follows (Petition, 28):

> "The issue before the Court is whether, assuming the factual allegations of the complaint to be true, Ohio 'regulates' the business of insurance within the meaning of the McCarran Act."

Statutes Involved

Petitioner's statement of the "Statutes Involved" is correct as far as it goes (except for typographical omission, from the quoted portion of the McCarran Act, of the reference to the Sherman Act as one of the statutes from which the business of insurance is exempted to the extent regulated by State law.)

However, it omits any reference to the extensive Ohio insurance regulatory statutes which are an important part of this case. This court may take judicial notice of the Ohio insurance statutes as did the courts below (Petition, 28-30; 39-41).

The Ohio insurance statutes are set forth in title 39, Chapters 3901 to 3999 of the Revised Code of Ohio. They were found by the Court of Appeals to constitute "a comprehensive scheme for regulating practically all aspects of the business of insurance as transacted in that state" (Petition, 39). They are summarized in the opinions below (Petition, 28-30; 39-41) and we feel need not be set forth in detail in this brief.

Statement of the Case

The petitioners' "Statement Of The Case" is argumentative and biased and to some extent inaccurate as, for example, the statement that "the Ohio insurance statutes are alleged to be a mere pretense and not regulation" (Petition, 5). The Court of Appeals expressly found that there was no such language in the complaint and that the conclusory allegations thereof as to non-regulation were "not only in conflict with the elaborate statutory scheme prescribed by Ohio law, but in any event are not sufficient on a motion to dismiss for failure to state a claim to develop a factual issue which the appellees are required to meet" (Petition, 44).

The respondents can present no better "Statement of the Case" than that set forth at the beginning of the Court of Appeals opinion. They therefore adopt it as their own for this brief and herein set it forth (Petition, 34-36, emphasis indicated is by the Court):

> "This is an antitrust action instituted by Ohio AFL-CIO, The United Autoworkers of Ohio, and Ira Thompson as a licensed automobile operator in Ohio carrying automobile liability insurance, against the Insurance Rating Board (IRB), one of its members, United States Fidelity and Guaranty Company (USF&G), and Eugene Brown, the Ohio Superintendent of Insurance, alleging violations of the Sher-

man Antitrust Act by a combination and conspiracy in the fixing of prices of automobile insurance premiums. It is alleged that rate increases were instituted by the IRB in Ohio in 1965, 1966 and 1968 on a statewide average for automobile liability insurance of 4.47%, 13.5% and for automobile liability and property damage of 7.9%, respectively, without any state regulation.

The complaint seeks injunctive relief against the charging of rates other than the rates made effective in November 1966, against the acceptance of any further filings for rate increases during the pendency of the action, and against any combination or conspiracy to restrain trade or to monopolize trade and commerce in violation of the Sherman Antitrust Act. There is also a claim for treble damages and other statutory benefits.

There are general allegations in the complaint to the effect that the IRB and its predecessors and its members and subscribers acting in concert with various departments of insurance among the several states have violated and are now violating the Sherman Antitrust Act by unlawfully contracting, combining and conspiring to restrain trade in inter-state commerce with respect to the business of automobile casualty insurance and by unlawfully contracting, combining and conspiring to control, regulate and dictate terms and fix the prices upon which automobile liability and collision insurance shall be sold throughout Ohio and other states.

It is alleged that the IRB is composed of 129 insurance companies which are members and subscribers, all of whom have started charging increased premiums approved by the IRB on July 10, 1968, for automobile insurance 'all without any state regulation to the detriment of the members of the Ohio AFL-CIO, the United Autoworkers of Ohio, Ira Thompson, and all others similarly situated.' It is further alleged that the insurance companies having membership in the IRB write approximately 17% of the automobile liability insurance in Ohio and approximately 22% of the

physical damage insurance in that state and 'through their rates and practices influence all automobile insurance rates charged throughout the state.' The complaint proceeds to allege further that under Ohio law, Revised Code Chapter 3937, the IRB, its members and affiliates and other insurance companies are permitted to set the effective date of any rate increases that they desire to institute; that such rate increases become effective immediately upon the date set by the said insurance companies; that such rate increases have never been challenged in the State of Ohio by the Department of Insurance or by any one except the plaintiffs; and that 'the Department does not even employ or have on its staff an actuary so as to be able to examine the rate filing.' *In essence the complaint is that there is an absence of state regulation in Ohio and that that state has abdicated its function of regulating the automobile insurance industry in favor of regulation by the automobile insurance industry itself.* The defendants, IRB, USF&G, and the Superintendent of Insurance, moved to dismiss the complaint on the ground of lack of jurisdiction of the Court because of the exemption of the business of insurance from the operation of the antitrust laws provided for by the McCarran Act, 15 U.S.C. Sec. 1011. In the alternative, they moved for dismissal of the complaint for failure to state a claim on which relief could be granted and for summary judgment on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

The district court in its opinion held that the Ohio statutory scheme for regulating the business of insurance *constituted regulation within the meaning of 15 U.S.C. Sec. 1012(b),* providing that the antitrust laws 'shall be applicable to the business of insurance to the extent that such business is not regulated by state law.' Answering the plaintiffs' argument that the Ohio scheme of regulation was not effective and therefore could not be deemed to constitute the kind of regulation contemplated

by the McCarran Act, the district court stated: 'A court is not empowered to make a policy judgment as to the type of regulation which is desirable. The Ohio legislature has adopted a statutory scheme which sets *standards* for insurance rates. This court is not concerned with the wisdom of the standards but with the limited question of whether or not the legislation is regulation under the McCarran Act.'

Citing *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 564, the court held that Ohio had provided general standards for the operation of the business of insurance and consequently that Ohio had 'regulated' the business of insurance within the meaning of the statutory exemption. Pursuant to this opinion the *court dismissed the complaint for lack of jurisdiction of the subject matter* without considering the alternative motion for summary judgment: On appeal, the principal issue before us is whether the district court was correct in its conclusion that Ohio regulated the business of automobile insurance so as to qualify for the McCarran Act exemption."

The Court of Appeals agreed with and affirmed the District Court holding that the business of insurance in Ohio is "regulated" within the meaning of the McCarran Act and is therefore not subject to the Federal antitrust laws.

Argument Opposing Writ

The decision of the Court of Appeals was right. It was in accord with the provisions of the McCarran Act and the accepted concept of insurance regulation contemplated thereby as recognized by this court, by Congress and by other well reasoned decisions throughout the country. The contentions of the petitioners are entirely unsupported by authority.

1.

As noted by the Court of Appeals (Petition, 33-35) the gravamen of the complaint is alleged combination and conspiracy to fix prices of automobile insurance premiums and to monopolize a part of the automobile insurance business in alleged violation of the Sherman Anti-trust Act (Complaint, par. 10, 13, 16; Petition, 19-22).

Ohio has comprehensively regulated the business of insurance and thus removed it from the operation of the Federal anti-trust laws as provided by the McCarran Act. Moreover, it has expressly regulated insurance in the very area complained of and, in the light of the historical development of insurance rating and the practical necessities of the business, has expressly authorized cooperative action among insurers and interchange of information among insurers and insurance supervisory officials.

Section 3937.17 of the Ohio Insurance Code provides:

> "Sections 3937.01 to 3937.17, inclusive, of the Revised Code shall be liberally interpreted to the end that insurance rates shall not be excessive, inadequate, or unfairly discriminatory, and *co-operative action among insurers in rate making* and in other matters within the scope of such sections *shall be authorized and regulated.* Such sections *do not prohibit* or discourage reasonable competition, or prohibit or encourage *uniformity in insurance rates,* rating systems, or rating plans or practices." (Emphasis added)

Section 3937.12 provides in part that:

> "The superintendent and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers, and rating organizations in other states and may consult with them with respect to rate making and the application of rating systems."

The Ohio statutes are typical, in this respect, of those passed in virtually every state following the McCarran Act. See Note, 47 Col. L. Review 1314 (1947).

This kind of state legislation expressly authorizing cooperative action in rate making, which might otherwise be prohibited by the Federal anti-trust laws, was contemplated by Congress when it enacted the McCarran Act and exempted insurance from the anti-trust laws to the extent that insurance is regulated by state law.

Congressional discussions so indicate. For example (91 Cong. Rec. 1471):

> "Mr. Pepper. * * * [I] am disturbed by * * * paragraph (b) of Section 2. * * * Does that mean that after June 30, 1948 the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?
>
> Mr. McCarran. The answer to that question is 'Yes'. During the 3 year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts. * * * "

The intent is further developed by the following (91 Cong. Rec. 1472):

> "Mr. Pepper. Does that mean that the States can by their own laws defeat the applicability and operation of the Sherman Anti-trust Act and the Clayton Act?
>
> Mr. O'Mahoney. I think the answer to that question will be clear when I point out that there are certain agreements which can normally be made in the insurance business which are in the public interest, but which might conceivably be a violation of the anti-trust law, which prohibits combinations and agreements in restraint of trade."

The following passage in the pre-McCarran Act congressional discussion seems to leave no doubt as to the congressional intent (91 Cong. Rec. 1551):

> "Mr. Ferguson. Under the language which is now in the bill as it appears in the conference report, *if a State passes an act regulating insurance or taxing insurance, and that regulation is contrary to the Sherman Act or the Clayton Act, with three exceptions, then the State law would be the law.*" (emphasis added)

In the case at bar Ohio has expressly legislated with respect to the matters complained of by the petitioners (alleged insurance price fixing combination). In doing so it has also enacted its own comprehensive statutory regulation of insurance rates. As the record shows this has actually been applied in the case of the petitioners (Appendices 1 to 4 attached).

What the petitioners really complain of is not lack of regulation but lack of satisfactory result in their resort to that regulation.

2.

The Court of Appeals was right in holding that, in view of Ohio's adoption of "a comprehensive scheme for the regulation of automobile liability and property damage insurance", summarized in three full pages of its opinion (Petition, 39-41), there is no substance to the contention of the petitioners that such regulation is not "effective" or to their gratuitous assertion (not alleged in the complaint, as the court noted) that it is "mere pretense".

The court also correctly found no support whatever for the contention of the petitioners that state regulation of insurance is not "regulation" within the meaning of the McCarran Act exemption unless the court, upon examination, finds that it was "effective" regulation.

Such a contention was unanimously rejected by this court in *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 564-565 (1958) in the following language:

> "Petitioner also argues in a different vein that even if the McCarran-Ferguson Act bars federal regulation where state regulation has been effectively applied, the exercise of Commission authority in these cases should be upheld because the States have not 'regulated' within the meaning of the section 2(b) proviso. This argument is not persuasive in the instant cases. Each State in question has enacted prohibitory regislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision. Petitioner does not argue that the statutory provisions here under review were mere pretense. Rather, it urges that a general prohibition designed to guarantee certain standards of conduct is too 'inchoate' to be 'regulation' until that prohibition has been crystallized into 'administrative elaboration of these standards and application in individual cases'. However, assuming there is some difference in the McCarran-Ferguson Act between 'legislation' and 'regulation', nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioner. So far as we can determine from the records and arguments in these cases, the proviso in Section 2(b) has been satisfied."

Congress has so interpreted the *National Casualty* decision. See report of the Senate Sub-Committee on Anti-Trust and Monopoly, "The Insurance Industry—Aviation, Marine and State Regulation", Rep. No. 1834, 86th Cong., 2d Sess. (1960) at p. 5, which is quoted in the opinion of the Court of Appeals as follows (Pet., 43-44):

> "It now seems evident from this Supreme Court decision that the McCarran Act language, 'to the extent that such business is not regulated by State law,' restricts Federal authority regardless of whether the States are actively enforcing their regulations. If the States have enacted regulatory statutes, *capable of being enforced within their borders,*

> the Federal antitrust laws would apparently not apply. In such cases, no proof would apparently be entertained as to the extent to which the law had been administratively enforced. It also seems doubtful the Court would permit a questioning as to the equality of the State regulatory law." (Emphasis by Court)

This Sub-Committee report is a valid expression of Congressional intent and completely offsets and negatives any possible contrary fragmentary expressions of opinion by individual legislators, relied upon by petitioners (Petition, 9-11).

Moreover, the omission of Congress to make any change in the McCarran Act, following publication of the 1960 Sub-Committee Report referred to above, is an indication, we submit, of Congressional acquiescence in the views expressed in the report.

Other decisions throughout the country have, without exception, arrived at the same result.

In *Allstate Insurance Co.* v. *Lanier,* 242 F. Supp. 73 (E.D., N.C. 1965), aff'd. 361 F. 2d 870 (4th Cir. 1966); cert. denied 385 U.S. 930, the plaintiff in effect complained that North Carolina had not effectively regulated automobile insurance rates because, under its statute, plaintiff, an independent insurer, was compelled to join a state rating bureau and charge the same rates as other insurers, there being no provision for downward deviation, so that "individual companies are effectively precluded from competing through offering lower premium rates" (361 F. 2d at p. 871). Despite intervention by the Department of Justice which argued in substance that North Carolina rate regulation was inadequate to provide McCarran Act exemption from the anti-trust laws the court held that "this is not the form of competition which the plaintiffs prefer but it is the form of competition selected by the legislature of North Carolina as compatible with

the automobile liability insurance statutes of North Carolina" (242 F. Supp. at p. 89). In affirming, the U.S. Court of Appeals expressly held: "Whether the statutory plan embodies the wisest and most effective type of regulation is of course not a judicial question" (361 F. 2d at p. 873). As noted, this court denied certiorari.

Lynch v. *Insurance Rating Board* [U.S. District Court, Middle District of Tennessee, Nashville Division, Dec. 4, 1968, unreported—copy of opinion attached to this brief as Appendix 5] was a case in which the complaint was almost identical to that in the case at bar except that the Tennessee statute provided for prior approval of insurance rates. There the court rejected the plaintiff's argument that Tennessee's rate regulatory statute did not constitute "regulation" sufficient to qualify for McCarran Act anti-trust exemption because Tennessee (as is now claimed for Ohio) did not "effectively" regulate insurance (Appendix 5 attached, 20a-21a). The court cited this court's decision in *National Casualty* and also *Allstate Insurance Co.* v. *Lanier*. The court concluded (Appendix 5 attached, 21a):

> "With regard to plaintiff's argument that the Commissioner of Insurance and Banking is not properly evaluating rate filings of the IRB, it is sufficient to say that under Tennessee law the Commissioner is required to disapprove any rate filing when 'he determines, after due consideration, that such filing does not meet the requirements of this chapter.' T.C.A. § 56-603(c). If the Commissioner is not fulfilling his statutory duty, a remedy must be sought in state, not federal, court."

There is no merit to the argument of the petitioners that Ohio statutory automobile insurance rate regulation is ineffective or a "mere pretense" because rates become effective immediately upon filing instead of requiring prior review and approval by the Superintendent (Complaint, par. 18; Petition, 22). This so called "file and use" type

statute is a recognized form of state insurance rate regulation which has been adopted in many states, and by Congress itself for the District of Columbia [D.C. Code (1967 ed.) Sec. 35-1503(f) (casualty insurance)].

Equally fallacious is the argument that there is no "regulation" of the business of insurance in Ohio because the Ohio courts, interpreting Ohio administrative review statutes invoked by the petitioners, found that the petitioners (only one of them a policyholder*) were not entitled to review of the Superintendent's decision after hearing in their case or that, for other reasons, the rate regulatory statute was allegedly deficient procedurally (Petition, 4-6). Even assuming *arguendo* that the procedural criticisms of the petitioners were valid, the question is not "whether the statutory plan embodies the wisest and most effective type of regulation" (*Allstate Insurance Co.* v. *Lanier,* above, 361 F.2d at p. 873) but whether it constitutes "regulation" as contemplated by the McCarran Act anti-trust exemption.

We submit that the controlling principle is soundly expressed in the following passage in the opinion of the Court of Appeals (Petition, 42):

> "An ideal type of regulation may possibly envision the removal of the alleged deficiencies in the Ohio statutes referred to by the appellant. Yet the question before us is not whether the Ohio method of regulation compares favorably with the regulations of other states, or whether it is an ideal manner in which to regulate the business of insurance. We are confident that Congress in enacting the McCarran Act *did not intend to impose a uniform standard of regulation upon all of the states.* It is our view that the congressional intent was *to leave to the judgment*

* The plaintiff, Thompson, was one of 323,000 private passenger automobile policyholders to which the questioned automobile insurance rates of the respondent, Insurance Rating Board, applied. Some of them received rate reductions in the filings which Thompson challenged (Court of Appeals Appendix, 24a).

of each state the specifics of regulation which it should see fit to adopt. Suffice it to say at this point that we are confident that the comprehensive plan adopted by Ohio is fully adequate to meet the requirements of regulation contemplated by the McCarran Act." (Emphasis added.)

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

RUDOLPH JANATA, OF
WRIGHT, HARLOR, MORRIS & ARNOLD,
Counsel for respondents, The Insurance Rating Board and United States Fidelity and Guaranty Co.

JOHN P. WALSH, OF
DONOVAN, DONOVAN, MALOOF & WALSH,
Counsel for respondent, The Insurance Rating Board

WARREN A. HERLAND, on the brief

APPENDIX 1

Decision of Superintendent of Insurance of State of Ohio, Dated May 12, 1967

STATE OF OHIO

DEPARTMENT OF INSURANCE

Hearing Before Director WILLIAM R. MORRIS

re

NATIONAL BUREAU OF CASUALTY UNDERWRITERS

AND

NATIONAL AUTOMOBILE UUDERWRITERS ASSOCIATION

Rate Revisions Effective November 30, 1966

This matter came on for hearing on February 14, 15 and 16, 1967 upon the applications of Ira C. Thompson and the Ohio AFL-CIO under Section 3937.04 (B), Ohio Revised Code. Those applications related to the automobile insurance rate revisions of the National Bureau of Casualty Underwriters and the National Automobile Underwriters Association which became effective November 30, 1966. The revisions pertained, respectively, to automobile liability insurance and automobile physical damage insurance rates for the member and subscriber companies of the National Bureau of Casualty Underwriters and the National Automobile Underwriters Association. The applicants alleged that such revised rates were excessive and unfairly discriminatory.

Chapter 3937 of the Ohio Revised Code provides that "Rates shall not be excessive, inadequate, or unfairly discriminatory." In determining whether the rates under consideration in the hearing meet the requirements of the Ohio regulatory law, the statute requires, and I gave consideration to, the following factors, based upon evidence

presented at the hearing and the very substantial volume of information and knowledge available to the Ohio Insurance Department:

a. Past and prospective loss experience in Ohio and elsewhere.

b. The experience or judgment, or both, of the ratemakers.

c. The experience of other ratemakers.

d. Normally contemplated physical hazards.

e. Catastrophe hazards.

f. A reasonable margin for *underwriting profit* and contingencies.

g. Dividends, savings, or unabsorbed premium deposits.

h. Past and prospective expenses.

i. All other relevant factors in Ohio and elsewhere.

The following general areas of testimony were offered by the applicants:

First, the applicants attempted to discredit insurance accounting practices used in preparing annual statements. Insurance accounting practices, while somewhat different from conventional accounting practices, have been uniformly required of insurance companies by state regulatory authorities for many years. Such practices are important for the purpose of evaluating the financial health of insurance companies. These practices have no relation to the ratemaking procedure. The applicants' testimony in this respect was immaterial to the issue of excessive or discriminatory rates. The applicants offered no substantial evidence to discredit the statistical and actuarial data used by the National Bureau of Casualty Underwriters and the

National Automobile Underwriters Association in the compilation of rates.

Second, the applicants proposed that investment income on unearned premium reserves and loss reserves be considered in the ratemaking procedure. This testimony was also immaterial to ratemaking. Inclusion of investment income from reserves in the ratemaking formula would be inconsistent with long-established and widely-accepted requirements among insurance regulators throughout the country. It would not only be inappropriate, but also beyond departmental authority, to compel that investment income from reserves be included in ratemaking. Insurers use investment income to meet the needs for insurance coverage by a growing population. Such needs have never been greater than at the present time.

Finally, much inference and innuendo was presented by the applicants to indicate that the rate revisions were excessive and unfairly discriminatory. This evidence was largely incomplete and inconsistent. Its import, therefore, is either "meaningless" or "misleading." Independent expert analysis of the hearing testimony submitted to me confirms the findings and conclusions reached by Department of Insurance rating technicians.

After careful consideration of all of the foregoing, I find that the automobile insurance rates which took effect for the National Bureau of Casualty Underwriters and the National Automobile Underwriters Association member and subscriber companies on November 30, 1966 are not excessive, inadequate or unfairly discriminatory, and that they, therefore, meet the statutory standards of the Ohio rate regulatory law. Accordingly, the applications of Ira C. Thompson and the AFL-CIO under Section 3937.04(B), ORC should be, and hereby are, dismissed.

WILLIAM R. MORRIS, Director
Ohio Department of Insurance

APPENDIX 2

No. 230,476

Decision of Court of Common Pleas, Franklin County, Ohio, rendered April 3, 1968
[Ohio AFL-CIO et al v. National Bureau of Casualty Underwriters, et al]

COURT OF COMMON PLEAS,

FRANKLIN COUNTY, OHIO

OHIO AFL-CIO, et al.,

Appellants,

against

NATIONAL BUREAU OF CASUALTY UNDERWRITERS, et al.,

Appellees.

Rendered this 3rd day of April, 1968.

STERN, *J.*

This is an appeal from a finding and order of the Director of Insurance, Ohio Department of Insurance (Director), dated May 12, 1967, which disallowed and dismissed the application of appellants objecting to the rate increase for automobile insurance put into effect by National Bureau of Casualty Underwriters (NBCU) and National Automobile Underwriters' Association (NAUA) on the date the said rates were filed, to-wit November 30, 1966.

Appellants assert that their appeal from the Director's finding and order is based upon the provisions of the Ohio Administrative Act (A.P.A.), (sections 119.01 et seq.,

and particularly section 119.12): That the appellees failed to file with this Court a complete record of the proceedings as required by section 119.12 R.C. In addition, appellants claim that in arriving at a conclusion in his finding and order, the Director considered evidence outside the record. Appellees contend that the appellants' appeal is not subject to A.P.A., and that the Director's decision is proper and lawful.

Briefly, the items presented to this Court are:

1) NBCU and NAUA, pursuant to the authority of section 3937.03 R.C., filed their rate revisions on November 30, 1966 with the Director. The Director found that the rate revisions filed with him complied with Chapter 3937 R.C. and that therefore they became effective on their filing.

2) Appellants requested a hearing on the filings and such hearing was held on February 14,-16, 1967.

3) On May 12, 1967, the Director issued his finding and order in deciding that the appellants' objections were not well taken.

Appellants contend that this appeal is authorized by section 119.12 R.C. as they are a party adversely affected by an order of the Director. In addition, appellants claim that the specific statutory authority for their appeal is based upon section 3901.041 R.C. as an "adjudication" of the Director's general power and duties, which are subject to review by an appeal perfected under A.P.A. (section 119.12 R.C.).

Appeals under A.P.A. (section 119.12 R.C.) are limited to findings and orders of an agency pursuant to "adjudication" under said sections, and that appeals can only be perfected by "any party adversely affected" by such finding and order.

Appendix 2

Section 119.01 R.C. defines "adjudication" as the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits or legal relationship of a *specified person.* "Party means a person whose *interests* are the subject of an adjudication by an agency. "Appeal" is designated as "the procedure by which a person aggrieved by a finding, decision, order or adjudication of an agency, invokes the jurisdiction of a court."

There are three ways to determine whether a state agency is subject to A.P.A.

1) The agency being specifically named. Section 119.01 R.C. does not name the Director as an agency.

2) The agency has authority to issue, suspend, remove or cancel licenses. The question of licenses of such is not the subject of the appeal before this Court.

3) The legislation concerning the agency specifically subjects the agency's findings and orders to A.P.A.

In the light of A.P.A. and the various applicable sections considered in the Insurance Code of Ohio (Title 39 R.C.) we have to determine first whether appellant is a person aggrieved by the Director's finding and order, which decision may be reviewed by the Court upon appeal.

Chapter 3937 R.C. provides that a casualty insurance company or rating bureau in filing any revision of insurance rates files such modification with the Director. The Director's sole function is to determine whether or not the rate filing complies with the statute. If it does, the rates become effective on the date of their filing. If it does not, the portions of the revisions which the Director finds do not comply, are no longer effective. In the consideration of the compliance by the Director of such rate modifications the solo and only parties in interest are the insurance company or rating bureau and the Director.

Appendix 2

An analysis of subdivisions (A) and (B) of section 3937.04 R.C. indicates that the hearing requested by a person or organization is limited by those directly affected by the Director's failure to determine that the modified rates as filed do not comply with the statutes. A person or organization whose interest is primarily that of a policy holder or representing a group of policy holders who are required to pay higher insurance rates is not a party to the filing of rates with the Director and therefore is not a "party" as designated in section 3937.15 R.C., which is the only section which directly refers to appeals from orders and decisions of the Director. The basis of all of the items referred to in this particular code section is postulated upon the opening words, "any insurer or rating organization aggrieved by any order, etc." The portion of the section which refers to orders and decisions which may be reviewed by the courts is limited to Chapter 3937 R.C. No where in Chapter 3937 is there any support for any theory that any person or organization or rating bureau has a right as a matter of law to be heard as to objecting to any insurance rates filed with the Director and even more so there is no provision in law for appeals to be perfected by persons or organizations other than casualty companies or rating bureaus. Section 3901.04 R.C. is not applicable to appeals from Chapter 3937 R.C. rate filings for the reason that the Director in acting upon rate filings has no authority in law to adjudicate such filings. His authority is limited solely to compliance or not compliance with Chapter 3937 R.C. In addition the appellate authority of Section 3901.041 R.C. in perfecting appellate proceedings by a person or organization is a general statement of appellate rights. The only possible appeal to Courts under rate modifications is found in Section 3937.15 R.C., and therefore the provisions of Section 3901.041 as to appellants' right of appeal from a decision made by the Director

is negated by Chapter 3937 R.C. Chapter 3937 is applicable only to appellants who have standing to appeal.

If we were to consider that Chapter 39 of the Revised Code pertained to appellants' position as a proper party under A.P.A., then such appeal would have to come under Section 3937.15 as a de novo appeal. If this be so, then appellants have not complied with the definition of a de novo appeal as defined in *Cupps vs. Toledo*, 172 O.S. 536 and *Fugate vs. City of Columbus*, 4 O.A. 2nd 147.

With reference to appellants' claim that the Director considered evidence outside the record, we must reject this contention for the basic reason that we have no transcript of proceedings and therefore have no way of determining what the evidence was and how germane it may be to a determination of the finding and order made by the Director.

The appeal taken by appellants is not authorized by statute and, therefore, appellants have no standing in law to appeal the finding and order made by the Director on May 12, 1967. Appeal dismissed. The decision of the Director, therefore, is *affirmed*.

LEONARD J. STERN, *Judge*

Appearances:

CLAYMAN, JAFFY & TAYLOR
Attorneys for Appellants,
42 E. Gay Street.

WRIGHT, HARLOR, MORRIS, ARNOLD & GLANDER
by RUDOLPH JANATA
Attorneys for NBCU and NAUA,
37 West Broad Street.

WILLIAM B. SAXBE, Attorney General

JAMES D. NEWCOMER, Ass't. Attorney General
Attorneys for Director of Insurance.

APPENDIX 3

(Decision of Court of Appeals of Franklin County, Ohio Dated August 26, 1969 [Ohio AFL-CIO, et al v. National Bureau of Casualty Underwriters, et al])

IN THE

COURT OF APPEALS

OF FRANKLIN COUNTY, OHIO

No. 9196

OHIO AFL-CIO

and

IRA C. THOMPSON,

Appellants-Appellants,

against

NATIONAL BUREAU OF CASUALTY UNDERWRITERS

and

NATIONAL AUTOMOBILE UNDERWRITERS ASSOCIATION

and

DIRECTOR WILLIAM MORRIS,
Department of Insurance, State of Ohio,

and

DEPARTMENT OF INSURANCE, STATE OF OHIO,

Appellees-Appellees.

DECISION

Rendered on August 26, 1969

Appendix 3

Clayman, Jaffy & Taylor, Mr. David Clayman and Mr. Stewart R. Jaffy, 71 East State Street, Columbus, Ohio, For Appellants-Appellants.

Wright, Harlor, Morris, Arnold & Glander, Mr. Rudolph Janata and Mr. James H. Ledman, 37 West Broad Street, Columbus, Ohio, and

Watters & Donovan, Mr. John P. Walsh, of Counsel, 161 William Street, New York, New York 10038, For Appellees National Bureau of Casualty Underwriters and National Automobile Underwriters Association.

Mr. Paul W. Brown, Attorney General, Mr. Robert D. Zitko, Assistant, Statehouse Annex, Columbus, Ohio, For Appellees Director William Morris et al.

Per Curiam.

The single issue presented by this appeal is whether the finding and order of the Director of Insurance, Ohio Department of Insurance, dated May 12, 1967, which disallowed and dismissed the application of the appellants objecting to the rate increase for automobile insurance put into effect by National Bureau of Casualty Underwriters and National Automobile Underwriters Association on November 30, 1966, was appealable by such appellants to the Common Pleas Court of Franklin County, Ohio. That court, by entry of May 21, 1968, held that it was not, and dismissed the appeal.

It now appears from the oral arguments that the particular rates which were protested and objected to by the appellants have been supplanted by new rate filings, to which no objections were filed. Even if one were to assume that the order of the director was somehow appealable to the Common Pleas Court of Franklin County under some provision or provisions of Chapters 119., 2505., or 3937. of

the Revised Code, it is conceded by all concerned that no effectual judgment could be rendered to "roll the rates back" or to collect back, on behalf of any insured, any premium so paid while such protested rates were in effect.

Where a "decision cannot be made effectual by a judgment," the appeal should be dismissed as being moot. *Miner* v. *Witt* (1910), 82 Ohio St. 237.

This basic law, as announced by the Ohio Supreme Court in *Miner* v. *Witt*, has never been reversed or modified by that court but, instead, has been followed in many cases. See 3 Ohio Jurisprudence 2d 539, §603, Appellate Review, Moot Cause, and the cases cited thereunder.

Appeal dismissed.

DUFFY, P. J., LEACH and HOLMES, *JJ.*, Concur.

APPENDIX 4

(Order of Supreme Court of the State of Ohio, Dated January 28, 1970 [Ohio AFL-CIO, et al v. National Bureau of Casualty Underwriters, et al])

THE STATE OF OHIO

CITY OF COLUMBUS

No. 69-744

OHIO AFL-CIO et al.,

Appellants,

against

NATIONAL BUREAU OF CASUALTY UNDERWRITERS et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS

FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX 5

Opinion

of

U.S. District Court, Middle District of Tennessee, Nashville Division, Dated December 4, 1968

[Lynch v. Insurance Rating Board, et al.]

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

Civil No. 5205

MATT LYNCH, Individually and as President of the TENNESSEE STATE LABOR COUNCIL, AFL-CIO

against

INSURANCE RATING BOARD, Atlanta Division, and DAVID PACK, Commissioner of Insurance and Banking, for the State of Tennessee

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In this action, plaintiff Matt Lynch, as President of the Tennessee State Labor Council and as a policyholder of an insurance company member of the Insurance Rating Board filed this complaint, on behalf of himself and as a class action on behalf of other automobile insurance policyholders similarly situated, against the Insurance Rating Board, Atlanta Division, (IRB) as the official representative of its approximately 129 members and subscribers, and against David Pack, the current Commissioner of Insurance and Banking for the State of Tennessee, invoking the jurisdiction of the Court under 15 U.S.C.A. §26.

Appendix 5

Plaintiff's complaint charges a conspiracy among members and subscribers of the IRB to monopolize and restrain trade in commerce in violation of the Sherman Anti-Trust Act, 15 U.S.C.A. §§1, 2.

Plaintiff alleges that the members and subscribers of the IRB have violated the Sherman Anti-Trust Act (1) by unlawfully agreeing to sell automobile insurance policies at rates fixed by the IRB rather than on the basis of individual company capability; and (2) by unlawfully agreeing to set underwriting standards which have no reasonable relation to risk, but are based on geographic and artificial classifications specificially designed to discriminate against a designated segment of the community.

Plaintiff further alleges that the Commissioner of Insurance and Banking has failed to regulate effectively the insurance industry contrary to the provisions of 15 U.S.C.A. §1011:[1]

(1) By refusing to consider in the evaluation process the fact that insurance companies receive money in advance periods on which interest is earned, and not reflecting this fact in the computation of the rates to be charged;

(2) By refusing to consider in the evaluation process the fact that the IRB pools non-risk elements which are not uniform for all companies, thus enabling the IRB to establish rates weighted to protect the least efficient operator; and

(3) By refusing to consider in the evaluation process the fact that insurance companies profit by the delays in the overcrowded court dockets in that interest on money

[1] 15 U.S.C.A. §1011 "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

due a claimant after an accident, which accrues from the date of the accident is retained by the companies.

The relief sought from these alleged violations of the Sherman Anti-Trust Act is a preliminary and permanent injunction, enjoining defendants from further violations of the Sherman Anti-Trust Act and an award of treble damages.

The sufficiency of the complaint in this antitrust action has been attacked by both defendants by motions to dismiss under FRCP 12(b)(1) on the ground that the Court lacks jurisdiction over the subject matter; under FRCP 12(b)(6) on the ground that the complaint fails to state a claim upon which relief can be granted; and under FRCP 17(a) and 23(a) on the ground that plaintiff is not a real party in interest and lacks capacity and standing to maintain this suit.

In the alternative, each defendant moves for summary judgment pursuant to FRCP 56 on the ground that no genuine material issue of fact exists, and that the defendants are entitled to judgment as a matter of law.

On September 23, 1968, defendant IRB, an insurance rating organization licensed by the Tennessee Commissioner of Insurance and Banking, on behalf of its Tennessee members and subscribers, requested a rate increase of 15% in private passenger automobile liability and physical damage insurance rates.

On October 4, 1968, plaintiff filed his complaint in this action seeking among other things to have the Court enjoin defendant Pack from engaging in any activity, either active or passive, which would result in the rate increase requested by the IRB on September 23rd.

Under Tennessee law the Commissioner of Insurance and Banking is required to approve a rate filing before the requested rate increase may be put into effect. However, with one unrelated exception, any filing shall be deemed

approved unless disapproved within thirty days. T.C.A. §56-603(c).

When the present action was filed the Commissioner had neither approved nor disapproved the IRB's automobile insurance filing of September 23rd. The thirty day period for disapproving the rate filing expired on October 23, 1968. This factor caused defendant Pack to move the Court to set plaintiff's motion for a preliminary injunction for hearing. A hearing on plaintiff's motion for a preliminary injunction, together with defendant IRB's motion to dismiss and for summary judgment, was set for October 21, 1968.

On October 18, 1968, Commissioner Pack pursuant to T.C.A. §56-603(c) disapproved the IRB's rate filing of September 23, 1968, and requested the Governor to appoint a study committee to inquire into the rating practices of the IRB. Plaintiff then moved the Court for a voluntary dismissal pursuant to FRCP 23 and 41.

A hearing on all motions was held on October 21, 1968. All motions were taken under advisement pending submission of briefs to the Court on the issue of subject matter jurisdiction.

The jurisdictional issue before the Court is whether the business of insurance in Tennessee is subject to the proscriptions of the federal antitrust laws.

The pertinent federal statute, popularly known as the McCarran Act, provides that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act

> of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 15 U.S.C.A. §1012(b).[2]

Thus it is clear that the business of insurance in Tennessee is not subject to the proscriptions of the federal antitrust laws to the extent that the insurance business in Tennessee is "regulated" within the meaning of §1012(b), by the laws of Tennessee.[3]

On the subject of what constitutes regulation within the meaning of §1012(b) the Federal District Court for the Northern District of California in *California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co.*, 175 F.Supp. 857, 860 (1959) said:

> This Court is of the opinion that a State regulates the business of insurance within the meaning of §1012(b) when a State statute generally proscribes (*F.T.C.* v. *National Cas. Co.*, 1958, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed. 2d 1540) or permits or authorizes certain conduct on the part of the insurance companies In *F.T.C.* v. *National Cas. Co., supra,* the Court held that there was State regulation within the meaning of §1012(b) when a State act generally prohibited "certain standards of conduct." 357 U.S. at

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[2] 15 U.S.C.A. §1012(a) provides that "The business of insurance, and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

[3] In enacting the McCarran Act "Congress' purpose was broadly to give support to existing and future state systems for regulating and taxing the business of insurance." Prudential Insurance Co. v. Benjaman, 328 U.S. 408, 429-30 (1946). To give specific effect to this policy Congress included §1012(b).

page 564, 78 S.Ct. at page 1262. From the above case it would seem to follow that if a state has generally authorized or permitted certain standards of conduct, it is regulating the business of insurance under the McCarran Act.

As a part of its statutory regulation of the insurance business Tennessee expressly requires that every insurer file with the Commissioner every rate and rating plan it proposes to use. T.C.A. §56-603(a).[4] No insurer can make or issue a contract or policy except in accordance with filings which have been approved for that insurer. T.C.A. §56-603(h).

The Commissioner of Insurance and Banking must approve or disapprove every filing, specifying, if he disapproves, in what respect the filing does not meet the statutory requirements. T.C.A. § 56-603(e). Each filing, with one unrelated exception, shall be deemed approved unless disapproved within thirty days.[5] T.C.A. § 56-603(c).

An insurer may satisfy its obligation to make rate filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings and by authorizing the Commissioner to accept such filings on its behalf. T.C.A. § 56-603(b).

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[4] The "Tennessee Insurance Law" is found under Title 56, Chapters 1 to 36, of the Tennessee Code Annotated. (T.C.A.). The Tennessee statutes regulating insurance rate making and rate making organizations are found in Chapter 6 of Title 56, T.C.A. §§56-601 through 615.

[5] If at any time the Commissioner finds that an approved filing no longer meets the requirements of this Chapter, he must, after notice and a hearing, issue an order withdrawing his approval thereof. T.C.A. § 56-603(f). Any person or organization aggrieved by the action of the Commissioner with respect to any filing may, within thirty days after such action, make written request to the Commissioner for a hearing thereon. T.C.A. § 56-603(h).

Thus cooperative action among insurers in rate making is expressly sanctioned by statutory provisions for the filing of rates through rating organizations. In addition, T.C.A. § 56-613(c) provides for cooperative rate making efforts as follows:

> In order to further uniform administration of rating laws, the Commissioner and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers and rating organizations in other states and may consult and cooperate with them with respect to rate making and the application of rating systems.

In addition to expressly sanctioning the use of rate making organizations, the Tennessee legislature has enacted legislation regulating rating organizations.

Rating organizations are required to be licensed by the State of Tennessee. T.C.A. § 56-604 outlines the procedure to be followed by the various rating organizations in applying for said license. Such a license is issued only after a finding by the Commissioner that "the applicant is qualified." In addition, rating organizations are required to be examined by the Commissioner or his appointee at the rating organization's expense at least once every five years. T.C.A. § 56-607.

In summary, the State of Tennessee has established standards which insurance rates must meet, and has authorized the enforcement of these standards through a scheme of administrative supervision. In addition, the State of Tennessee has authorized the filing of rates through rating organizations licensed and supervised by state officials. From what has been said it is clear to the Court that the laws of Tennessee "regulate" the business of insurance in Tennessee within the meaning of § 1012(b).

However, plaintiff contends that the federal antitrust laws are applicable to the business of insurance in Ten-

nessee because the Tennessee Commissioner of Insurance and Banking has failed to regulate "effectively" the insurance industry. He insists that the Commissioner, in evaluating rate filings of the IRB, has refused to consider certain factors which plaintiff apparently believes entitles the insured drivers in Tennessee to lower car insurance rates than those they are presently paying.

In effect what plaintiff is saying is that regulation within the meaning of § 1012(b) requires more than a statutory scheme of regulation. The thrust of this argument is that the Commissioner of Insurance and Banking has not effectively enforced the laws of Tennessee regulating the business of insurance.

The United States Supreme Court in disposing of a similar argument in *F.T.C.* v. *National Casualty Co.*, supra, said:

> This argument is not persuasive in the instant cases. Each State in question has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision . . . . assuming there is some difference in the McCarran-Ferguson Act between "legislation" and "regulation," nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioners. So far as we can determine from the records and arguments in these cases, the proviso in Section 2(b)[6] has been satisfied. 357 U.S. at 564-65.

Tennessee has enacted prohibitory legislation proscribing unfair, unreasonable, inadequate or unfairly discriminatory insurance rates and has authorized the enforcement of these requirements through a scheme of

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[6] 15 U.S.C.A. § 1012(b).

administrative supervision. T.C.A. § 56-602(4). Assuming, as the Supreme Court did in the *F.T.C.* case, that there is some difference in the McCarran Act between legislation and regulation, there is nothing in the language of the Act, nor has plaintiff directed the Court's attention to anything in the Act's legislative history, which supports plaintiff's argument that the statutory exemption does not apply when a state's scheme of regulation has not been effectively enforced. The Court, as above stated, is of the opinion that the business of insurance, insofar as rate making and rate making organizations are concerned, is "regulated" by Tennessee law within the meaning of § 1012(b)[7], and, that the federal antitrust laws, including the provisions of the Sherman Act relied upon by plaintiff, are inapplicable in this case.

With regard to plaintiff's argument that the Commissioner of Insurance and Banking is not properly evaluating rate filings of the IRB, it is sufficient to say that under Tennessee law the Commissioner is required to disapprove any rate filing when "he determines, after due consideration, that such filing does not meet the requirements of this chapter." T.C.A. § 56-603(c). If the Commissioner is not fulfilling his statutory duty, a remedy must be sought in state, not federal, court.

In conformity with this opinion judgment will be entered dismissing plaintiff's action for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim upon which relief can be granted. It follows, in view of this disposition of the action, that the Court must deny the plaintiff's motion for a voluntary dismissal without prejudice. Since the Court concludes

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[7] Whether a state's statutory plan embodies the wisest and most effective type of regulation is not a judicial question. See *All-State Insurance Co.* v. *Lanier*, 242 F. Supp. 73 (E.D. N.C. 1965), aff'd. 361 F.2d 870 (4th Cir. 1966).

that plaintiff has no right to relief under the antitrust laws because of the exemption of the McCarran Act, such denial does not cause plaintiff to suffer the loss of a substantial right.

As the plaintiff's action must be dismissed for the reasons stated, the issue of standing need not be discussed.

WILLIAM E. MILLER
United States District Judge

Attest: A true copy
BRANDON LEWIS, Clerk
U. S. District Court
Middle District of Tennessee
By: L. M. EDWARDS, D.C.